90-979

No. -

IN THE

Supreme Court of the United States

October Term, 1990

VEON GARRISON,	)	
	)	
Plaintiff-Appellant,	)	
	)	Appeal from the
v.	)	United States Court
	)	of Appeals for the
CITY OF INDIANAPOLIS and	)	Seventh Circuit
INDIANAPOLIS DEPARTMENT OF	)	
ADMINISTRATION,	)	
	)	
Defendants-Appellees.	)	

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the proper standard that should be used in this case to compare the Plaintiff-Appellant with white employees that of "employees involved in acts of comparable seriousness" rather than the standard applied by the United States District Court for the Southern District of Indiana, Indianapolis Division, which was "similarly situated employees," given the intentional nature of the wrongdoing alleged against the Plaintiff-Appellant by the employer, the City of Indianapolis?

2. Was Plaintiff-Appellant treated differently than white employees involved in acts of comparable seriousness by the City in the way it conducted an investigation of charges against him?

3. Was the disciplinary action taken by the City against the Plaintiff-Appellant more severe than actions taken against white employees involved in acts of comparable seriousness?

4. Was the Plaintiff-Appellant's proof sufficient to support an inference of discriminatory intent on the part of the Defendants?

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INDIANAPOLIS DEPARTMENT OF	)	
ADMINISTRATION,	)	
	)	
Defendants-Appellees.	)	

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Comes now the Plaintiff-Appellant, Veon Garrison, by counsel and pursuant to Rule 12 of the Supreme Court Rules, respectfully requests that the Court grant a Writ of Certiorari in the above- captioned case and in support thereof states the following:

REPORTS OF OPINIONS DELIVERED IN THE CASE

There was no formal opinion of the United States District Court for the Southern District of Indiana, Indianapolis Divi-

sion. The Findings of Fact and Conclusions of Law are reproduced in Appendix B of this Petition. No published opinion was issued by the United States Court of Appeals for the Seventh Circuit. Its unpublished order is set forth in Appendix C of this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS

1. On the 28th day of November, 1988 the United States District Court for the Southern District of Indiana, Indianapolis Division handed down its final judgment in favor of the Defendants-Appellees.

2. Plaintiff-Appellant proceeded to file an Appeal in the United States Court of Appeals for the Seventh Circuit.

3. On the 18th day of July, 1990 the United States Court of Appeals for the Seventh Circuit affirmed the grant of judgment to Defendants- Appellees from the United States District Court for the Southern District of Indiana, Indianapolis Division.

4. On the 21st day of September, 1990 Plaintiff-Appellant filed an Application for an Extension of Time with the Supreme Court of the United States of America.

5. On the 25th day of September, 1990 the Supreme Court of the United States of America handed down an Order granting an extension of time to file a Petition for a Writ of Certiorari from the 16th day of October 1990 to and including the 15th day of December, 1990.

6. The statutory provision, 28 U.S.C. Sec. 1254(1), confers on this Court jurisdiction to review the judgment in question by Writ of Certiorari.

CONSTITUTIONAL STATUTES INVOLVED IN THE CASE

The statutory provisions involved in the case are 42 U.S.C. Sec. 2000e-2(a) and 42 U.S.C. Sec. 2000e-2(h), both of which are set forth in Appendix A of this Petition.

STATEMENT OF THE CASE

This is a civil action brought by the Plaintiff- Appellant, Veon Garrison (Garrison), an individual black employee of the City of Indianapolis, Indiana, to enforce the provisions of 42 U.S.C. Sec. 2000e et seq.

On October 17, 1983 Garrison started work for the City of Indianapolis as an hourly employee in the City Equipment Maintenance Division of its Department of Administration (CEMD). After a probationary period of sixty (60) days ending December 15, 1983, Garrison was fired by CEMD on December 19, 1983 but was reinstated ten (10) days later after he filed a grievance with the Equal Employment Opportunity Commission.

On February 8, 1985, CEMD fired Garrison again, this time on a disputed charge in which it was alleged he stole an auto battery from a CEMD storeroom. At a meeting with CEMD management on the same day, Garrison was told that he was to receive a five (5) day suspension as requested by Garrison's union representative, in lieu of termination. Garrison then left the meeting. In Garrison's absence, Charles Chapman, an employee working at CEMD in the parts-department, who first reported the alleged battery theft, accused Garrison of three (3) other thefts. CEMD then extended the five (5) day suspension pending further investigation. Garrison was not given a chance to respond to these accusations before the suspension was extended. When Garrison was notified of the extension of his suspension, he was not told there were any additional accusations made against him. CEMD management prepared a letter of reinstatement dated February 21, 1985, however, Garrison did not accept the terms of the offered reinstatement because he would be put on a ninety (90) day probation period and not allowed back pay. On the same day that Garrison received this Notice of Reinstatement, he also received notice that CEMD had rescinded it. Chief Administrator James B. Garvie relied on the verbal report of Mr. Chapman concerning earlier alleged thefts and decided to rescind the Notice of

Reinstatement. On February 25, 1985, Garrison filed another EEOC charge.

On March 4, 1985 a hearing was held by CEMD administration concerning the charge of theft against Garrison. Garrison was not present and he was not represented at the hearing by either union official or attorney. He was given no advance notice of the hearing or its subject matter. He still had not been given any notice that additional charges had been made against him by Mr. Chapman. A letter was prepared by CEMD to Garrison advising him of the hearing, but it was dated either the day of or the day after the hearing. This letter to Garrison did state the additional charges against him, but CEMD never delivered the letter.

After learning of the CEMD administrative hearing, Garrison filed a formal grievance through his union representatives, and the grievance went straight to a "stage three" hearing before the City Personnel Director according to the employee handbook. This occurred in mid-March of 1985 and it was at the "stage three" hearing that Garrison first learned of the additional charges against him. Garrison was not represented by counsel at that hearing.

Garrison received confirmation of his termination by letter approximately one (1) week following the "stage three" hearing. Garrison then filed for unemployment compensation and on March 28, 1985 the Indiana Employment Security Division made an initial determination that Garrison was not discharged for just cause and he began receiving benefits. CEMD appealed the award and a hearing was held in Indianapolis, Indiana on April 24, 1985 before the Indiana Employment Security Review Board. The Review Board determined that the findings of the initial determination were in agreement with the evidence of the record and affirmed the determination of the deputy.

On behalf of Garrison, his AFL-CIO Union Chapter submitted the discharge grievance to arbitration in August of 1985. On

the 6th day of November, 1985, the Arbitrator denied the grievance filed by the Union on behalf of Garrison. At the arbitration hearing, however, Garrison learned that a "Prime" brand battery was what he allegedly stole. But the only battery he possessed was a Fleener battery, a brand CEMD did not stock. The City had not disclosed this as well as other material information to Garrison during its investigation.

The original basis for Garrison's dispute of his discharge was that he did not steal the battery he was charged with stealing. The claim he brought to the Courts was that the City treated him differently than it treated white employees of CEMD who committed acts of comparable seriousness. Garrison asserts that white employees have been treated differently than him both in the manner of the investigation by CEMD and the resulting disciplinary action taken.

At Garrison's trial, James B. Garvie, Administrator of CEMD, testified that the City Employee Handbook applied to all City employees and sets out guidelines for the imposition of progressive discipline for the offenses listed. It was up to the facility coordinator, a white management level employee, to determine the appropriate category of discipline as allowed by the handbook, for a particular incident of alleged misconduct. The discipline for a specific offense was thus determined by the facility coordinator's categorization of the incident under the guidelines of the Employee Handbook.

One example of the importance of the facility coordinator's determination was the treatment of heavy equipment mechanic Dominic Mangine, a white employee. He was accused of taking an unplated City vehicle off the premises without authorization and later becoming involved in a traffic accident with that vehicle. Mr. Mangine could have been charged with unauthorized use of City property or theft, but he was charged with unauthorized absence from work place. The latter offense carries a less severe recommended penalty, and he received only a written reprimand. Garrison's offense, on the other hand, was

categorized as theft of City property, and he was ultimately fired.

A second example is Jody Tilford, a white employee, who was initially accused of theft but whose charge was categorized as unauthorized use of City property. Mr. Tilford testified that in order to get his stalled car off the freeway, he had taken a fuel pump without the permission of CEMD from a vehicle consigned to the CEMD garage for storage and repairs, and put the pump in a drawer at the garage, where it stayed for more than a month until his actions were reported and an investigation begun. For that offense he received a (1) day suspension.

James Hanson is yet another example. He is a white male who was employed by CEMD. On December 6, 1985 Hanson was discovered in possession of City property which was believed to be stolen. An investigation by CEMD ensued. Hanson admitted his theft of City property on January 7, 1986. He was ultimately discharged, but was allowed to work at CEMD until January 15, 1986, six (6) weeks after the initial discovery of the theft and eight (8) days after Hanson admitted the theft to police. Hanson was never suspended and continued to work while under investigation up until the date of termination. Thus Hanson lost no pay during the investigation by the City.

Following an adverse arbitration award, Garrison pursued his EEOC claim through the administrative procedure and then to trial at the District Court. His Complaint was filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, on November 14, 1986 charging the City of Indianapolis and its Department of Administration with violations of his rights under 42 U.S.C. Sec. 2000e and also under 42 U.S.C. Sec. 1981 and Sec. 1983. Garrison's complaint went to trial on October 11, 12, and 13, 1988 and resulted in a verdict for the City. The trial court issued its written Findings of Fact and Conclusions of Law on November 28, 1988.

Garrison then appealed his case to the United States Court of Appeals for the Seventh Circuit. On July 18, 1990, the Court of Appeals affirmed the grant of judgment to Defendants by the United States District Court.

Garrison proceeded to file an Application to Extend Time to File a Petition for a Writ of Certiorari with the Supreme Court of the United States of America upon which the Court, on the 25th day of September, 1990 granted an enlargement of time for filing a Petition for a Writ of Certiorari to and including the date of December 15, 1990.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The United States District Court for the Southern District of Indiana, Indianapolis Division, stated that in order to establish his case, Garrison had to show that he was a member of a protected class, he was otherwise similarly situated to members of the unprotected class, and he was treated less favorable than the similarly situated members of the unprotect. ' class. (Appendix B, p. B-15, District Court's Finding of Fact and Conclusion of Law, Citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303 (7th Cir. 1985); *Dodson v. Marsh*, 678 F.Supp. 768 (S.D.Ind. 1988)). The District Court concluded that Garrison failed to establish a prima facie case, because the individuals Garrison contended were treated more favorably were not similarly situated to him. (Appendix B, p. B-15, District Court's Findings of Fact and Conclusions of Law). Two of the reasons given for the dissimilarity of situation by the District Court are: (1) two of the employees were members of management, and (2) three of the employees had significantly more seniority than Garrison. (Appendix B, pp. B-15, B-16, District Court's Findings of Fact and Conclusions of Law, Citing *McGee v. Randall Division of Textron, Inc.*, 837 F.2d 1365 (5th Cir. 1988); *Papritz v. United States Department of Justice*, 1987 WL 10, 877

(D.D.C. 1987); *Bower v. Board of Comm'rs*, 674 F.2d 693 (8th Cir. 1982); *Gill v. Western Electric Corp.*, 594 F.Supp. 48, 51 (N.D. Ill. 1984)).

The United States Appeals Court for the Seventh Circuit upheld the above finding by the District Court and relied on *Doe v. First National Bank of Chicago*, 865 F.2d 864, 877 (7th Cir. 1989) concerning similarly situated employees. (Appendix C, pp. C-4, C-5, Appellate Court's Order). In *Doe* the Seventh Circuit held that an employee's long tenure and generally strong employment record were properly considered by the District Court in finding that the plaintiff was not similarly situated to certain other employees. However, in *Rhode v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 322 (5th Cir. 1981) the Fifth Circuit stated that, at the prima facie stage of a disparate treatment by discharge case, the differences between the employees in job skill and job status are largely irrelevant in determining the similarity between the member of the protected class and the members of the unprotected class. The Fifth Circuit Court of Appeals went on to state:

> "What is relevant [to the establishment of a prima facie case] is that two employees are involved in or accused of the same offense and are disciplined in different ways" *Id.*

That is, differences in job statuses should not defeat a prima facie case of disparate treatment by discharge. Thus, the Court of Appeals for the Seventh Circuit is in conflict with the Court of Appeals for the Fifth Circuit by affirming the District Court's decision that Garrison did not establish his case because the white employees were not similarly situated based on job position or tenure. (Appendix B, p. B-15, District Court's Findings of Fact and Conclusions of Law).

A third basis that the District Court stated for finding that certain employees were not similarly situated to Garrison was that they were engaged in conduct different from his. (Appendix B, p. B-15, District Court's Findings of Fact and Conclusions of Law). Plaintiff-Appellant concedes that no other employee was accused of stealing a battery from a CEMD store

room, however, he did present evidence of comparable allegations against white employees. In determining whether disparate treatment is indicative of discrimination, the District Court's focus should be on the similarity of the misconduct committed by the employees and employee work records. *Gill v. Western Electric Corp.*, 594 F.Supp. 48, 51 (N.D. Ill. 1984). It is, of course, true that certain misconduct committed by different employees is not comparable. In the case of *Boner v. Board of Comm'rs*, 674 F.2d 693 (8th Cir. 1982), the Court of Appeals concluded that the offense of suspected embezzlement was not comparable to the offense of poor job performance. In such case there is obviously no similarity between the offenses. In the case at hand, however, Garrison presented evidence of disparate treatment of him as compared to white employees who committed acts which constitute the unauthorized taking of City property, i.e., theft. The City of Indianapolis simply chose not to charge the employees compared to Garrison with the same offense due to more lenient categorization of the offense by the facility coordinator. But a different categorization of similar acts by the white facility coordinator does not make the offenses incomparable. To the contrary, it shows the means by which the City discriminated against Garrison.

Jody Tilford, a white employee of CEMD, took a fuel pump from CEMD premises and used it for personal use on his own vehicle without permission of the City of Indianapolis. Dominic Mangine, a white employee of CEMD, took a city vehicle off the CEMD premises without permission or clearance and operated the vehicle in an illegal manner due to the fact that the vehicle was without license plates and was involved in an accident subsequent to leaving the restricted area. James Hanson was discovered in possession of city property which was believed to be stolen and later admitted his theft of the property. All of these acts of misconduct, including the alleged act of Garrison, involved property that was taken without permission of the CEMD. Thus, the District Court should have found that Garrison had at least established a prima facie case for disparate treatment by discharge.

Once the prima facie case had been established by Garrison, the City of Indianapolis then would have had the burden of articulating the legitimate nondiscriminatory reasons for its actions. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The District Court found that the City carried its burden in regard to articulating a legitimate nondiscriminatory reason for discharging Garrison. (Appendix B, p. B-16, District Court's Findings of Fact and Conclusions of Law). The Defendants-Appellees offered evidence of differences in job status and tenure in order to prove a legitimate and non-discriminatory reason for the differing treatment of employees. See *Rhode v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 322 (5th Cir. 1981). Under the triplicate standards as set out in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) the burden then shifts back to the plaintiff to show that the articulated reasons for the discharge were actually a pretext for discrimination. Under *Monroe v. Guardsmark* 851 F.2d. 1065, 1067 (8th Cir. 1988), the Court of Appeals stated that "especially relevant [to a showing of pretext] would be evidence that white employees involved in acts of comparable seriousness were nevertheless retained or rehired." Citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973). The Court of Appeals goes on to state that an employer may justifiably discharge one who has engaged in unlawful, disruptive, or improper acts against it, but only if the criteria for employee discharge are applied consistently to members of all races. *Id.*

The white employees of CEMD mentioned above committed acts of at least comparable seriousness to the one allegedly committed by Garrison, thus the City of Indianapolis should have treated those white employees in the same fashion as Garrison. But not one of those white employees were terminated upon CEMD's first learning of the offense charged, as Garrison was. White employees were usually given short suspensions (three (3) days or less) or reprimands for their conduct rather than discharge. And during an investigation of alleged

misconduct, a white employee would ordinarily not be suspended but remain on the CEMD payroll until the investigation was concluded. As mentioned above, even the white employee (James Hanson) who was caught with City property and later admitted to theft from the City when the police arrested him, was allowed to continue working for CEMD for six (6) weeks after he was first caught. Garrison was treated differently than white employees by CEMD and the City in the investigative phase of the disciplinary procedure and in the result. And this differing treatment was discriminatory on its face as the criteria used for employee discharge was not applied the same to members of protected classes as to the unprotected class.

The decisions reached under *Monroe v. Guardsmark*, 851 F.2d. 1065 (8th Cir. 1988) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) hold that employees of different races involved in acts of comparable seriousness should be treated similarly in disciplinary action. There is certainly a difference between unintentional wrong doings by employees and intentional wrongs. *Doe v. First National Bank of Chicago*, 865 F.2d 864 (7th Cir. 1989), is the case upon which the Court of Appeals for the Seventh Circuit in the instant appeal relied in affirming the decision of the District Court as to Garrison's failure to present evidence of similarly situated employees. (Appendix C, pp. C-4, C-5, of the Appellate Court's Order). In *Doe*, the allegedly similarly situated unprotected class employee was not discharged after making an excess distribution to the beneficiaries of an estate. *Id.* The employee made an unintentional mistake, a clerical error to be precise.

> ". . . the District Court found that this employee was treated differently because of the long tenure, generally strong employment record, the isolated nature of this error and the employee's regret about the mistake". *Id* at 877.

The plaintiff's misconduct in *Doe* was also unintentional in that it was her poor quality of work performance. But the instant

case involves conduct that should be classified as intentional wrong doing. In such case, seniority or job position should not give an employer discretion as to discipline in these matters.

In order to serve the purposes expressed in the anti-discrimination in employment statutes under which Garrison appeals to this Court, the Court should clarify that all employees who commit acts of comparable seriousness, when it comes to intentional wrong doing, should be treated the same. Certainly, allowances might be made for employees who have shown loyalty and effort with regard to unintentional mistakes or poor performance on the job. Those employees, however, who intentionally commit acts of wrong doing, such as theft of company property, must be disciplined according to the seriousness of the act committed regardless of such other factors as seniority and loyalty. Allowing an employer complete discretion as to discipline in cases where intentional acts of wrong doing or illegal acts have been committed on the job will perpetuate discrimination against minorities and women and weaken statutory protections afforded minority employees by Title 42. If the employer is allowed to take into account job position, seniority and subjective factors such as "company loyalty", when determining the proper discipline of an employee who has committed an intentional wrong or illegal act, then senior and upper management employees will consistently receive less severe treatment then those in lower and starting positions. Most upper level positions are dominated by white males while women and minorities occupy lower positions and have less seniority. It is fair to assume that the dominant class will try to protect its own to the extent allowed. And what interest is served, other than protection of the dominant class, by allowing employers to discriminate in the discipline of employees who commit intentional wrongs or commit illegal acts on the job? Discrimination against African Americans in employment discipline is as American as apple pie. This Court should take the opportunity to clarify the law as to the treatment of employees who allegedly commit comparable intentional wrongs on the job. This case is especially appropriate for such a

clarification. The City of Indianapolis is the employer in the case at hand. It is a municipality within the governmental structure of the United States of America. Social policy, as expressed in the civil rights laws is best applied first to the government itself. Let us reverse what has been labelled by some as a trend of this Court to "turn back the clock" on the protections afforded minorities by the law. Here we have a black man who insists on his innocence of the theft charged, was so found by the unemployment office, and was treated differently than white employees in the way the City conducted its investigation and the resulting discipline.

Perhaps it makes sense to allow employers significant discretion in their discipline of employees who make errors, because there are many different types and degrees of unintentional wrongs one might commit in a job. And it would certainly offend fairness and reasonableness to require an employer to invoke the same discipline against an employee who made his first error in twenty (20) years as against an employee who makes a significant mistake on her first day on the job. But what purpose is served by allowing employers to fire an entry level black employee for theft but only slap the hand of a twenty year vice president, who is white, for the same type of act? The interest in maintaining such a double standard is either overt or disguised racism.

CONCLUSION

For all foregoing reasons, including the conflict in the opinions handed down by the Appellate Courts as stated earlier in the petition, Plaintiff- Appellant respectfully requests the opportunity to have the decision rendered against him in the United States District Court of Indiana, Indianapolis Division, and affirmed by the United States Court of Appeals for the Seventh Circuit reviewed by this Court.

Review is especially important for the purpose of clarifying whether or not a Plaintiff establishes a prima facie case under the statutes plead by Garrison by showing that white employ-

ees were consistently treated more favorably with respect to discipline for intentional misconduct.

Respectfully submitted,

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Appendix A

§2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this sub-

chapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VEON GARRISON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	IP 86-1387-C
	)	
CITY OF INDIANAPOLIS AND ITS DEPARTMENT OF ADMINISTRATION,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for bench trial on October 11, 12 and 13, 1988. Prior to that, counsel had filed their respective pre-trial briefs and proposed findings. At the conclusion of the trial, the Court, having been convinced that the Plaintiff had failed to prove the material allegations of his Complaint, announced that it would be required to find against the Plaintiff and for the Defendants. The Court directed counsel for the Defendants to refine their proposed findings in light of the evidence submitted. The Court also invited a response from the Plaintiff to the Defendants' amended proposed findings and conclusions. Having analyzed the Defendants' proposed findings and Plaintiffs' response thereto, the Court is satisfied that the Defendants' proposed findings accurately and substantially conform to the evidence.

Plaintiff would have the Court include additional findings concerning the battery inventories. During the trial and final arguments, Plaintiff's counsel vigorously argued the point Plaintiff also attempts to make in his post-trial response with

respect to the discrepancies in the testimony relating to the battery inventories. In the face of the credible eyewitness testimony regarding the Plaintiff's taking of a "Prime" model battery, the Court finds that ample evidence is in the record to support a finding that Defendants in good faith believed that Plaintiff had taken a "Prime" model battery. That same evidence leads the Court to find that Defendants were not racially motivated in discharging Plaintiff and that Plaintiff was not the victim of disparate treatment. Accordingly, the Court adopts the findings and conclusions submitted by the defense. Those findings and conclusions have been scrutinized and carefully related to the evidence and are found to be amply supported in the record.

Thus, the Court, having considered all the evidence, including exhibits, testimony, and credibility of the witnesses, and having further considered the arguments of counsel in their pre-trial and post-trial briefs, hereby enters the following findings and conclusions as, and for, those of the Court.

FINDINGS OF FACT

1. The City of Indianapolis is a municipality, and one of its departments is the Department of Administration. One of the divisions of that Department is the Central Equipment Management Division ("CEMD"). CEMD performs service and maintenance on City vehicles and equipment.

2. Since 1980, James Garvie has been Administrator of CEMD. Since 1983, Carl Bennett has been Assistant Administrator. Between 1982 and 1985, Gene Pennington was Facility Coordinator.

3. At times material, approximately 30% of CEMD's work force were black employees and several of its supervisors were black. At various times, CEMD also has employed temporary help from Manpower, Inc.

4. At all times relevant to this action, hourly employees at CEMD have been represented by the American Federation of

State, County and Municipal Employees ("AFSCME"), AFL-CIO, Indiana Council 62. Since 1976, Dominic Mangine, a heavy equipment mechanic at CEMD, has been President of the Local Union. AFSCME and the City have been parties to a series of agreements including one that was in effect from January 1, 1985, to December 31, 1986. Hourly CEMD employees were governed by this agreement.

5. The City also has an Employee Handbook given to all employees. In the back of the Handbook are groupings and tables of work rules that distinguish types of inappropriate conduct for employees and provide recommended guidelines for disciplinary actions.

6. The City has no rule requiring or not requiring suspension pending investigation of an alleged rule violation. The City has no rule requiring that before disciplinary action can be taken against an employee accused of theft of City property that employee must be arrested by the police or convicted of theft.

7. Veon Garrison is a black male. He was hired by CEMD on October 17, 1983, as a heavy maintenance mechanic's apprentice. That position was part of the bargaining unit.

8. In December, 1983, CEMD informed Garrison that he was terminated for performance during his probationary period. However, CEMD reinstated Garrison on December 29, 1983, after determining it had not effectuated his termination before the expiration of his 60-day probationary period.

9. During the next year, Garrison received a written reprimand for poor job performance, he was placed on 60-day disciplinary probation for poor job performance and warned that if his performance did not improve he was subject to termination, he received a written reprimand for poor performance and was placed on 90 days' probation.

10. At all times relevant to this action, the procedure when a mechanic or other CEMD employee needed parts, supplies or

fluids for a City vehicle on which he was working was for the mechanic to go to the parts window with a pre-numbered document called a "Repair Order." The parts room employee then prepared a pre-numbered document called a "Parts Requisition" on which he listed the parts given to the mechanic, the Repair Order number, the vehicle number and the date.

11. At the far end of the CEMD facility, located off a corridor which runs from the parts room to a parts receiving door, is a battery storage room. CEMD maintained its inventory of vehicle batteries in this room. In February, 1985, CEMD's inventory consisted of "Prime" and "Delco" brand batteries. The door to the battery room was kept locked. When a mechanic needed a battery, he went to the parts window and requested a battery just as he would request any other part. A Battery Log was kept in which each battery issued to a mechanic was recorded.

12. As part of standard inventory procedure, a battery inventory was taken on the first of each month. Ron Stinson was the Supply Room Supervisor at the Riverside facility and responsible for the battery inventory. A battery inventory was taken on February 1, 1985, by a supervisor, Mark Stahl.

13. During the first week of February, the battery room was being painted for a period of two to three days. Apparently, from time to time while the painting was ongoing, the batteries were moved from the battery room to the hallway, and when put back in the battery room, an inventory was taken. This included an inventory taken on February 6, 1985, by a bargaining unit employee named Darryl Whitfield.

14. In February, 1985, Charles Chapman and Zane Geberin were Manpower, Inc., employees working at CEMD as temporary parts clerks.

15. On the morning of February 8, 1985, Chapman was admitted to the locked battery room by Supervisor Ron Stinson to work in the room. Later, Garrison came into the battery room. He was not carrying anything. Chapman saw

Garrison put a new "Prime" brand battery in a white cardboard battery box and start to leave the battery room. Garrison did not present a Repair Order to Chapman. They heard someone coming down the hall (Geberin), and Garrison put the battery down. After Geberin went by, Garrison picked up the battery, left the battery room and went through the parts receiving door that led to the employee parking lot. Chapman saw Garrison in the lot through a window.

16. That morning, temporary Manpower employee Geberin came working through the corridor from the parts receiving door (which comes from the employee parking lot) past the battery room. He looked in as he passed by and saw a black individual by the new batteries with his hands on a new battery box. However, he could not identify the individual.

17. Shortly thereafter Chapman came to Geberin and reported what had happened.

18. Because Chapman had been admitted to the battery room by his supervisor and he was aware that battery inventories had been taken, Chapman feared he would be held responsible for the battery he saw Garrison take. Chapman asked Geberin what he should do. Geberin suggested they report the incident, and they went to Assistant Administrator Bennett's office. However, Bennett was in a meeting, and they were asked to come back around 11:00 A.M.

19. Chapman returned to the battery room, and Garrison again came in. Garrison wanted to know if the new batteries were fully charged. Chapman walked Garrison out of the room and locked the door. He then went to Geberin again and told him that Garrison had made a second trip to the battery room.

20. Chapman and Geberin later met with Bennett. Chapman told Bennett about Garrison coming into the battery room and taking the battery. Geberin told Bennett that Chapman had come to him and told him of the incident earlier that morning. Geberin also informed Bennett he had been walking down the corridor past the battery room around 8:30 A.M. He

told Bennett that he looked in the room as he walked by and saw a black individual by the new batteries with his hands on a new battery box, but he could not tell who it was.

21. Bennett contacted Facility Coordinator Pennington and asked him to secure Garrison's Repair Order and Parts Requisition for that morning to determine whether they called for a new battery. Pennington did so. Neither called for a new battery. Pennington gave the documents to Bennett.

22. Additionally, Pennington personally went out to inspect the vehicle Garrison had worked on that morning and looked under the hood to ascertain if a new battery had been installed. It had not.

23. Bennett asked Supply Supervisor Ron Stinson to inventory the batteries in the battery room. Stinson did so and, comparing the February 1 inventory to his, found the inventory was short batteries — including "Prime" models. Stinson reported this to Bennett.

24. Bennett and Pennington met with Mangine and Garrison at 3:30. Bennett informed them that it had been reported to him that Garrison had been seen taking a battery from the battery room, and it was a dischargeable offense. Mangine responded that Garrison had been with him all afternoon. Mangine and Garrison asked for a caucus and left the room for several minutes. When they returned, Garrison had a used battery and placed it on the conference table. It was not a "Prime" brand but a "Fleenor" brand. Garrison stated that the battery Chapman had seen him with was from his own car and Garrison had brought it in to charge it. This did not explain Chapman and Geberin's report since the battery Chapman reported taken was new and a "Prime" brand. Also, there were no battery chargers in the battery room.

25. The Indianapolis police had been called and arrived on the scene. They talked with Garrison, but no arrest was made.

26. Union President Mangine asked that Garrison be given a suspension pending investigation. It was agreed that Gar-

rison would be placed on a five-day suspension pending further investigation. The suspension later was extended.

27. Later that day on the 8th, Garrison sought Bennett out. Garvie saw Garrison pass in the hall on his way to Bennett's office. Garrison approached Bennett to talk about the charge of taking the battery. Garrison told Bennett that there were two additional missing batteries located in the shop, one in the steam cleaning bay and one located under a work bench on the heavy equipment side of the repair shop. Garrison asked Bennett if he provided the additional information, "would it go lighter on him." Bennett thought Garrison was looking for a trade-off for the charge against him, but told him it was out of his control. Garrison left.

28. Bennett then instructed that a search be conducted for these additional batteries, one in the steam cleaning bay and one located under a work bench on the heavy equipment side. A search was made, and Stinson reported that no batteries were found.

29. CEMD also tried to locate Garrison's daily time card for February 8, which he was supposed to give to his supervisor at the end of the shift. That card records each project on which an employee works on that day. CEMD wanted to compare Garrison's card for February 8 with Mangine's to see if they had worked on the same projects. However, Garrison's time card was not located.

30. After reviewing the matter and consulting with an attorney for the City and a representative of City Personnel (Carolyn Smith), CEMD Administrator Garvie met with Mangine and Garrison on the morning of February 21, 1985, and told them he had decided to give Garrison a second opportunity and not terminate him at that time but return him to work the next day and place him on 90-day performance probation.

31. Later in the morning after further discussion, Garvie asked the attorney for the City and the Assistant Administrator of Personnel to talk with Chapman. Chapman was

brought in, and the attorney interviewed him about the battery incident. Smith and Garvie were also present. In response to questions during the interview, Chapman informed the attorney about other incidents involving Garrison which occurred before the battery incident. Chapman reported the following to him:

(a) In December, 1984, Garrison approached the parts room window where Chapman was working. Garrison asked for several gallons of antifreeze. Chapman got the antifreeze and took a blank Parts Requisition form to fill out. He waited for Garrison to produce a Repair Order. Garrison did not produce a Repair Order but stated that the antifreeze was for his personal car.

(b) In late January, 1985, Garrison approached the parts room window where Chapman was working. Garrison requested three quarts of oil. Chapman gave him the oil, took a Parts Requisition form and began to fill it out asking Garrison for a Repair Order. Garrison did not produce a Repair Order but stated that the oil was for his own personal car. Chapman voided the Parts Requisition form he had started to fill out.

(c) In early February, 1985, Garrison approached the parts room window where Chapman was working. He requested a length of battery cable and a large eyelet which Chapman retrieved and gave to Garrison. Chapman began to fill out a Parts Requisition form with the digits of a Repair Order that Garrison was holding in his hand, but Garrison stated that the cable and eyelet were for his personal use. Chapman voided the partially completed Requisition Form.

(d) Chapman told him he had not reported any of these three incidents at the time they occurred because he just had started to work, and Garrison led him to believe it was alright. Additionally, as a new and temporary Manpower employee, Chapman was hesi-

> tant to get involved because CEMD was a union shop, and he was not part of the union.

This was the first time Chapman had been interviewed by counsel and the first time he identified the three specific previous incidents.

32. After this interview, the attorney, Assistant Administrator of Personnel and Garvie discussed the matter. It was decided to rescind the earlier letter given to Garrison, do a further investigation and reconsider what discipline to give Garrison. Garrison was notified that he was to remain on suspension, that further information was being investigated and that there might be other discipline.

33. Thereafter, the two Parts Requisition forms Chapman had begun to fill out but voided were retrieved from CEMD's records. Parts Requisition forms used at CEMD are sequentially numbered for audit purposes. All forms completed or voided are retained.

34. A few days later, the attorney for the City took a detailed sworn statement with a court reporter from Chapman about all the incidents. He took a statement from Geberin also.

35. During the first week of March, 1985, after reviewing all the evidence again, consulting with counsel and City Personnel and reconsidering, Garvie decided there would be a basis to change the discipline and termination would be warranted. Union President Mangine was asked to have Garrison report for a meeting. However, Garrison did not show up. Union President Mangine told Garvie to "go ahead" and send a letter to Garrison and let him file a grievance. A certified letter was sent to Garrison on that date outlining the infractions and informing him of the determination that discharge was warranted.

36. The next day Garrison invoked the grievance procedure under the collective bargaining agreement between the City and the AFSCME. Garrison's grievance involved a termina-

tion, and pursuant to the labor contract, it went directly to the third step. There was a third step grievance hearing before Thomas E. Parker (black) in which Garrison appeared with his Union representative. Bennett and Pennington appeared on behalf of CEMD. Garrison and the Union were given an opportunity to respond to all four of the incidents charged against Garrison.

37. On March 13, 1985, Parker issued his decision and agreed Garrison should be discharged.

38. Under the labor contract, Garrison was entitled to have the City's decision reviewed by an impartial arbitrator. Garrison requested arbitration. Arbitrator Peter DiLeone of Cleveland, Ohio, was selected to hear the case (through the processes of the American Arbitration Association).

39. A hearing was held before Arbitrator DiLeone in August, 1985, in Indianapolis. Garrison was represented at the hearing by three of his Union representatives and attorney Charles Brown. Garrison testified at the hearing and denied each of the incidents that Chapman had reported to CEMD. Both parties had the opportunity to present witnesses and documentary evidence and to cross-examine the other party's witnesses.

40. On November 6, 1985, Arbitrator DiLeone issued his written opinion in which he denied Garrison's grievance and found that the City had acted cautiously and had good cause to discharge him. Under the labor contract, this decision became final and binding.

41. On February 26, 1985, Garrison filed a complaint alleging that his suspension was due to his race. Defendant received a copy of this complaint sometime after March 8, 1985.

42. After receiving the Arbitrator's decision, on December 11, 1985, Garrison filed a second complaint with the Indiana Civil Rights Commission. He alleged that his March, 1985, termination was due to his race. He made no other allegations of discrimination or retaliation.

43. In pre-trial discovery, Garrison identified three white CEMD employees who he contends are similarly situated and who were not terminated. They are Jody Tilford, Ron Schauinger and Dominic Mangine. At trial, he also brought up the names of Charles Chapman and Doug Riddle.

44. Ron Schauinger has over 20 years' seniority with the City and was employed by CEMD as Facility Supervisor at the Belmont facility. In January, 1986, he was charged with being in the facility during unauthorized times and for unauthorized purposes; allowing others in the facility during unauthorized times; dispensing City keys to unauthorized personnel; using City vehicles for personal use; and allowing the falsification of time cards. As a result, Schauinger was demoted two management levels, placed on a 90-day probation, transferred to the Riverside facility on a less desirable shift and had his City vehicle privileges taken away.

45. Jody Tilford was a supervisor at CEMD with several years' seniority. In May, 1983, Tilford's car broke down on the interstate while in route to work. His fuel pump failed. He hitchhiked to the facility. He knew that a fuel pump on a Zamboni ice machine that was in the Riverside Garage for summer repairs would work on his car. He removed the pump and had another employee drive him to his automobile. He installed the pump and drove his car to the facility. That night he bought a new fuel pump and installed it after removing the Zamboni pump. He returned the Zamboni pump to the facility the next day and locked it in the supervisor's desk drawer. On June 22, 1983, the Union informed Garvie of the incident. The matter was investigated, and Garvie learned the above information. Tilford was given a one-day suspension without pay for unauthorized use of CEMD property.

46. Dominic Mangine was a heavy equipment mechanic who had been employed since 1975. He also was the Local Union President at CEMD and had been for 10 years. In 1985, Mangine was arrested and charged with attempting to sell a motorcycle engine casing without a serial number. However,

this arrest was not for any act against the City. The City has a specific procedure in its Handbook when an employee is arrested for a criminal act. A committee of several individuals (from City Legal, City Personnel, the Department of Administration and the respective department) meets to decide whether to suspend the employee pending resolution of the criminal charges or allow him to continue to work. Each instance is handled on a case-by-case basis. The City also has a work rule permitting discipline up to and including discharge if an employee is convicted of certain crimes. After it became known that Mangine had been arrested, a committee met and decided not to suspend him pending resolution of the charges. Mangine subsequently pled guilty to a misdemeanor and was given a one-year unsupervised probation. Several months later, it came to the attention of the City's Department of Personnel that Mangine had pled guilty to a misdemeanor. However, since so much time had passed, it was decided not to discipline Mangine for the misdemeanor. Subsequently, in August or September, 1985, Mangine was arrested and charged with possession of an altered motor vehicle case. However, again this was not an act against the City. It was decided not to suspend Mangine pending resolution of the charges. Mangine's charges were not resolved for almost two years, and in September of 1987, he pled guilty to a felony charge. Mangine was terminated on September 15, 1987. He subsequently filed a grievance, and his case went to arbitration. An arbitrator overturned Mangine's discharge and ordered the City to reinstate him. Mangine never has been charged with or convicted of any crime involving City property and never has been charged with or convicted of theft. Mangine never has been charged by CEMD with theft of CEMD property.

47. Charles Chapman was a white temporary employee working at CEMD in 1985. He and some other employees were assigned to clean up a second floor room and dispose of obsolete parts. These parts were thrown into a trash Dumpster. Some of the obsolete parts being thrown out included spark plug wires. Chapman asked his supervisor, Stinson, if he could have some

of the wires, and the supervisor gave him permission to take some. A few days later, there were rumors that Chapman had stolen property. He mentioned this to his supervisor who told him not to worry about it; he had been authorized to take the property. Chapman said he would return the wires. The next day he returned the property to his supervisor, and it was then thrown into the Dumpster.

48. Garrison failed to submit sufficient evidence to establish any similarity between his situation and Riddle's. The evidence that was presented does not show Garrison and Riddle were similarly situated.

49. CEMD has terminated several white employees for theft of CEMD property. Among those white employees who have been terminated are: Gene Miller, Richard Schauinger, John Tracey and James Hanson. Three of them were suspended pending investigation, the fourth was not due to his willingness to cooperate in an investigation of others involved in possible theft.

CONCLUSIONS OF LAW

Race Claims

1. Plaintiff focused much of his case on challenging the thoroughness of the CEMD investigation, whether CEMD had sufficient evidence to terminate him or whether certain items of evidence supported the decision. In employment discrimination cases, the Court does not sit as a super personnel department to review business judgments made by employers or to second-guess what it would have done in the same situation. *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557 (7th Cir.), *cert. denied*, 198 L.Ed.2d 486, 108 S. Ct. 488 (1987); *Dale v. Chicago Tribune*, 797 F.2d 458 (7th Cir. 1986). However, the Court finds that CEMD engaged in a reasonable investigation of the reports it had received on Garrison. It also finds that there was sufficient basis for the City reasonably to conclude that Mr. Garrison had stolen the battery and engaged in the three other

incidents of misappropriation of property, and in this regard the Court credits the testimony of Charles Chapman.

2. The issue the Court must determine is whether there was race discrimination. Garrison contends he was terminated due to his race in violation of Title VII and 42 U.S.C. §1981. The elements of proof under both of these statutes are the same. *Ramsey v. American Air Filter Co.*, 772 F.2d 1303 (7th Cir. 1985); *Mason v. Continental Illinois National Bank*, 704 F.2d 361 (7th Cir. 1983).

3. Since Garrison contends he was terminated because of his race, the merits of his claims must be analyzed under the disparate treatment theory. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, fn. 15 (1977). Garrison bears the burden at all times of persuading the Court that he was discriminated against "because of" his race. *United States Postal Service v. Aikens*, 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This is a "but for" test, and the ultimate inquiry in a disparate treatment case. *McQuillen v. Wisconsin Education Ass'n*, 830 F.2d 659 (7th Cir. 1987).

4. To establish his case, Garrison must show: (1) he is a member of a protected class; (2) he is otherwise similarly situated to members of the unprotected class; and (3) he was treated less favorably than the similarly situated members of the unprotected class. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Ramsey v. American Air Filter Co.*, 772 F.2d 1303 (7th Cir. 1985); *Dodson v. Marsh*, 678 F. Supp. 768 (S.D. Ind. 1988).

5. The Court finds that the white individuals Garrison contends were treated more favorably were not similarly situated to him. Two of the employees were members of management; three had significantly more seniority than he; and all had engaged in conduct different from Garrison's. *McGee v. Randall Division of Textron, Inc.*, 837 F.2d 1365 (5th Cir. 1988); *Papritz v. United States Department of Justice*, 1987 WL

10,877 (D.D.C. 1987); *Boner v. Board of Comm'rs*, 674 F.2d 693 (8th Cir. 1982); *Gill v. Western Electric Corp.*, 594 F.Supp. 48, 51 (N.D. Ill. 1984).

6. The City's burden is only to articulate legitimate nondiscriminatory reasons for its actions. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986); *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985). The City is not required to prove the absence of a discriminatory motive but only explain what it has done. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978). Once it presents legitimate nondiscriminatory reasons for its action, any presumption of unlawful discrimination is eliminated. *Sweeney, supra*, at 25, n.2; *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984).

7. The Court finds that the City has articulated legitimate nondiscriminatory reasons for terminating Garrison. It had been presented with eyewitness evidence that Garrison had stolen and misappropriated CEMD property on more than one occasion. It investigated his work order, the vehicle he worked on and checked the inventory; it took depositions of two witnesses; and it located the voided parts requisition forms. Additionally, CEMD sought and obtained the input of counsel and City Personnel. Garrison's explanation was denial that he had committed any of the acts. The Court further notes that Garrison testified that he knew of no reason why Chapman, Bennett, Garvie or the others would be out to get him. Garrison filed a grievance under the labor contract. Pursuant to the grievance procedure, the recommendation to terminate Garrison was reviewed by the City Personnel Director and upheld. Additionally, an impartial arbitrator sustained Garrison's discharge after a full hearing. That fact alone satisfies the burden of articulating a legitimate nondiscriminatory reason. *Jaksany v. United States Postal Service*, 755 F.2d 1244, 1252 (6th Cir. 1985); *Becton v. Detroit Terminal of Consolidated Freight-*

ways, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983).

8. The burden returns to Garrison to establish that the articulated reasons were not just pretext but a pretext for race discrimination. *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59 (7th Cir. 1986); *Matthews v. Allis-Chalmers*, 769 F.2d 1215 (7th Cir. 1985); *Tice*, *supra*; *Beard v. Whitley County REMC*, 656 F. Supp. 1461, 1472 (N.D. Ind. 1987), *aff'd*, 840 F.2d 405 (7th Cir. 1988). This final stage of the *McDonnell Douglas* analysis merges with Garrison's ultimate burden of proving that the Defendant intentionally discriminated against him because of his race. *United States Postal Service v. Aikens*, *supra*. The Court finds that Garrison has failed to show that the City's reasons for terminating him were a pretext for race discrimination, and the Court finds there is no evidence that the Defendant was motivated by Garrison's race when it terminated him.

9. Furthermore, surrounding facts negate any claimed inference of discrimination. Approximately 30% of CEMD employees are black, including several supervisors. Garvie's determination was reviewed under the contractual grievance procedure by Thomas Parker (black), Personnel Director for the City. It is highly unlikely Parker was motivated by Garrison's race when he issued his decision agreeing that the discharge was warranted. More importantly, CEMD has discharged several white employees for theft or misappropriation of CEMD property. *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980).

Retaliation Claim

10. Although Garrison's Complaint contains an allegation of retaliation, he did not argue it in his pre-trial brief nor raise it during the course of the trial or in final argument. However, since it was not withdrawn, the Court now will address that Complaint allegation.

11. Garrison never filed an administrative charge under Title VII alleging that his discharge was in retaliation for filing his February charge, and therefore he may not pursue a claim of retaliation under Title VII. 42 U.S.C. §2000e-5; *Shah v. Mt. Zion Hospital*, 642 F.2d 268, 271 (9th Cir. 1981). He only filed a claim that his discharge was racially discriminatory. A claim of racial discrimination is not the same as a claim of retaliation under Title VII. *Ekanem v. Health & Hospital Corp.*, 724 F.2d 563 (7th Cir. 1983). Additionally, 42 U.S.C. §1981 may not be used to bypass Title VII's procedures and enforce Title VII's right not to be retaliated against for filing a charge under Title VII. *Cf. Huebschen v. Department of Health*, 716 F.2d 1167 (7th Cir. 1983).

12. Furthermore, retaliation claims are disparate treatment claims. Thus, Garrison is required to show that "but for" the City's desire to retaliate against him "because" he filed the February 26, 1985, discrimination claim he would not have been terminated. *Klein v. Trustees of Indiana University*, 766 F.2d 275 (7th Cir. 1985); *Ekanem v. Health & Hospital Corp.*, 724 F.2d 563 (7th Cir. 1983).

13. Garrison's claim of retaliation under Title VII and §1981 fails on its merits. Defendant did not receive a copy of Garrison's February 26, 1985, complaint of discrimination until after March 8, 1985, which was after CEMD decided to terminate Garrison and after he had filed a grievance over CEMD's action. Thus, CEMD could not have been motivated by the fact Garrison had filed a charge, because Garvie was not even aware Garrison had done so when he made his determination. Furthermore, as noted earlier, the City has articulated non-retaliatory reasons for its termination of Garrison which have not been shown to be a pretext for retaliation.

42 U.S.C. §1983 Claims

14. Although Garrison's Complaint contains an allegation of violation of 42 U.S.C. §1983, he did not argue or raise those issues in his pre-trial brief, nor were they raised during trial or

at final argument. However, since they have not been withdrawn by Plaintiff, the Court will now address those issues.

15. Garrison alleges violations of 42 U.S.C. §1983. The doctrine of *respondeat superior* cannot be used in a §1983 claim to impose liability against the City. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978). Neither is the City's acquiescence in an isolated personnel action taken by its municipal officials sufficient to impose liability under §1983. *City of St. Louis v. Paprotnik*, 108 S. Ct. 915 (1988); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988); *Woods v. City of Michigan City*, 1988 U.S. Dist. LEXIS 4461 (N.D. Ind. 1988). Garrison's §1983 claims, therefore, fail. Furthermore, equal protection claims based on alleged race discrimination require Garrison to prove intentional discrimination because of his race. *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Bloomenthal v. Lavelle*, 614 F.2d 1139 (7th Cir. 1980). For the reasons cited above involving the Title VII and §1981 race discrimination claims, Garrison's claims fail.

16. Considering the record as a whole, each and every one of Garrison's claims fail, and the City is entitled to judgment, together with costs.

17. To the extent necessary to support the Court's judgment in this action, any finding of fact may be considered a conclusion of law, and any conclusion of law may be considered a finding of fact.

/s/ William E. Steckler
Judge, United States
District Court

Date: November 28, 1988

Appendix C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITHOUT ORAL ARGUMENT

Date: July 18, 1990

BEFORE:

Honorable Walter J. Cummings, *Circuit Judge*
Honorable Harlington Wood, Jr., *Circuit Judge*
Honorable Wilbur F. Pell, Jr., *Senior Circuit Judge*

No. 89-1046

VEON GARRISON,

Plaintiff - Appellant

v.

CITY OF INDIANAPOLIS and INDIANAPOLIS DEPARTMENT OF ADMINISTRATION,

Defendants — Appellees

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division No. 86 C 1387, Judge William E. Steckler

This cause came before the Court for decision on the record from the above mentioned district court.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this Court entered this date.

C-3

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Submitted July 11, 1990*
July 18, 1990.

Before:

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
HONORABLE WILBUR F. PELL, JR., *Senior Circuit Judge*

VEON GARRISON, *Plaintiff-Appellant,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 89-1046	)	
vs.	)	
CITY OF INDIANAPOLIS and INDIANAPOLIS DEPARTMENT OF ADMINISTRATION, *Defendants-Appellees.*	)	No. 86 C 1387 William E. Steckler, *Judge.*

ORDER

Appellant Veon Garrison appeals from the district court's entry of judgment in favor of defendants in this civil rights action alleging discharge from employment based on racial discrimination. We affirm.[1]

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal is submitted on the briefs and record.

[1] Appellees filed a motion to strike portions of Garrison's Third Initial Brief, arguing that his brief is not in compliance with two previous orders of this court which granted appellees' motions to strike. Given our disposition of the case we deny this motion, but note that we have not considered any material outside of the district court record.

I.

The details underlying Garrison's action were adequately presented by the district court and will not be repeated here. In short, Garrison, who is black, was a vehicle maintenance employee with the City of Indianapolis. He was discharged from his position after being accused of stealing city property. Garrison claimed the termination was actually the result of racial discrimination, and filed an action in district court under 42 U.S.C. §§1981, 1983 and 200e *et seq.*. The district court held a three-day bench trial, and entered judgment in favor of the city. Garrison raises three issues on appeal from that judgment.

II.

Our review of the district court's decision that the city did not intentionally discriminate against Garrison is limited to determining whether that decision was clearly erroneous. *Swanson v. Elmhurst Chrysler Plymouth*, 882 F.2d 1235, 1237 (7th Cir. 1989); *Doe v. First National Bank of Chicago*, 865 F.2d 864, 874 (7th Cir. 1989). To reverse such a finding, we must be "'left with the definite and firm conviction that a mistake has been committed.'" *Andersen v. City of Bessemer City*, 470 U.S. 564, 573 (1985) quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The fact-finder's choice between two permissible views of the evidence cannot be clearly erroneous. *Swanson*, 882 F.2d at 1237-38.

III.

Garrison first challenges the district court's finding that he was not similarly situated to the white employees with whom he compared himself. The court found that of the five white employees Garrison compared himself to, two were members of management rather than hourly employees, and three had much more seniority than Garrison. In *Doe*, 865 F.2d at 877, we held that an employee's long tenure and generally strong employment record were properly considered by the district

court in finding that plaintiff was not similarly situated to certain other employees. Moreoever, the district court in our case found that the acts of these employees were sufficiently different than Garrison's since none of them had been accused of theft of city property. Since the court's finding that the other employees were not similarly situated was plausible, it must stand. *Chesser v. Illinois*, 895 F.2d 330, 334 (7th Cir. 1990).

Second, Garrison challenges as clearly erroneous the district court's finding that defendants' articulated reasons for discharge were not a pretext for discrimination. Again, we disagree. Where, as here, the district court's finding is based heavily upon credibility determinations, we must be even more deferential to the district court's decision. *Doe*, 865 F.2d at 874. The court specifically credited the testimony of Charles Chapman, who was the primary witness to the acts upon which the discharged was based: the stealing of a car battery and three other incidents of misappropriating city property. The reasonableness of the city's investigation of the reports of Garrison's thefts was also a determination based significantly upon credibility, and we believe the evidence presented by the city was more than sufficient to prevent a clearly erroneous determination on review. Following Chapman's eyewitness account of the theft of the battery, the city investigated Garrison's work orders, checked its inventory, took depositions of two witnesses, located voided parts requisition forms, and received the input of counsel. When the city confronted Garrison with this information he provided an explanation of the facts which was inconsistent with the eyewitnesses' testimony and the other facts the city had gathered. The City Personnel Director upheld the termination in Garrison's grievance procedure, as did an impartial arbiter after a full hearing. The only evidence offered by Garrison to refute the legitimacy of the city's proffered reasons was his testimony that he did not commit the thefts of which he was accused. Given the evidence presented by the city, we cannot find clearly erroneous the district court's

finding that the city's legitimate reason for discharge (theft of city property) was a pretext for discrimination.[2]

Garrison's final argument on appeal is that his proof was "sufficient to support the inference of discriminatory intent and constitute a case of discriminatory discharge." If Garrison's argument is taken to mean he made out a sufficient prima facie case of discrimination, his argument is without merit since such presumptions and burden shifting are irrelevant once a discrimination case goes to trial.

> [W]hen the defendant fails to presuade the district court to dismiss the case for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for plaintiff's rejection [or dismissal], the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption 'drops from the case,' . . . and 'the factual inquiry proceeds to a new level of specificity.' . . .
>
> The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.' . . . In short, the district court must decide which party's explanation of the employer's motivation it believes.

U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714-16 (1983) (citations omitted); *see also Yowell v. United States Postal Service*, 810 F.2d 644, 647 (7th Cir. 1987).

If we instead interpret Garrison's argument to challenge the ultimate finding of no discriminatory intent by defendants, we still find no merit to the contention because we hold that the district court's decision was not clearly erroneous. There was more than enough evidence supporting the city's explanation of its motivation to prevent a holding here that the district court

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[2] The city also presented evidence that in the recent past, four employees other than Garrison had been charged by the city with theft of city property, all were terminated, and all were white.

was clearly erroneous in believing that explanation. Given the two findings we upheld above, the district court did not commit clear error in finding that Garrison's race was not a 'but for' cause of his termination, *Doe*, 865 F.2d at 875, but rather that the termination was based on his alleged theft of city property.

The district court's grant of judgment to defendants is

AFFIRMED.